

**Lucky Stores, Inc. and Charles J. Davis and Walter F. Price.** Cases 21-CA-18703 and 21-CA-19096

May 6, 1981

### DECISION AND ORDER

On December 2, 1980, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Party Charles J. Davis filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the rulings, findings, and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

### THE REMEDY

As we have found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule prohibiting distribution of union election campaign literature on company premises, we shall adopt the Administrative Law Judge's recommended cease-and-desist provision with respect to this violation. In the corresponding affirmative provision, however, the Administrative Law Judge recommends that the Respondent be directed to rescind "or modify" that rule. As the quoted language could lead to some ambiguity, and as rescission of the unlawful rule does not preclude the institution of a narrower, lawful rule, we shall delete the quoted language. We shall also modify the notice to conform to the Order.

<sup>1</sup> Charging Party Davis has requested additional time to secure private counsel and to present oral argument. These requests are hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties. We also hereby deny Charging Party Davis' motion to reopen the record as lacking in merit.

<sup>2</sup> The General Counsel and Charging Party Davis have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We also find totally without merit Charging Party Davis' allegations of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record, we perceive no evidence that the Administrative Law Judge prejudged the case or demonstrated any bias against Davis in his analysis and discussion of the evidence. At the same time, we find unnecessary and highly debatable the Administrative Law Judge's characterization of Davis as presenting "a marginal paranoia toward management which translates into maliciousness." Such psychological profiling is, of course, always hazardous. *Western Care, Inc. d/b/a Western Care Nursing Home*, 250 NLRB 509, fn. 2 (1980). Here, it is sufficient that the Administrative Law Judge was more impressed with the credibility of three witnesses who contradicted the crucial portions of Davis' testimony than he was with Davis' credibility.

Charging Party Davis represents that the Respondent's Buena Park, California, facility has moved or is about to move. In order to cover that eventuality, we shall direct that the notice be posted at any new location of the Buena Park operation.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Lucky Stores, Inc., Buena Park, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Rescind the rule prohibiting electioneering on company property or distribution of pamphlets on company premises other than working areas."

2. Substitute the following for the first sentence of paragraph 2(b):

"(b) Post at its Buena Park, California, facility, or at any location to which the Buena Park, California, operation moves, copies of the attached notice marked 'Appendix.'"

Substitute the attached notice for that of the Administrative Law Judge.

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT maintain or enforce any rule which prohibits electioneering on company property or distribution of pamphlets on company premises other than working areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights protected by the National Labor Relations Act, as amended.

WE WILL rescind our rule prohibiting electioneering on company property or distribution of pamphlets on company premises other than working areas.

LUCKY STORES, INC.

### DECISION

### STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Los Angeles, California, on September

23 and 24, 1980, based on a consolidated amended complaint alleging that Lucky Stores, Inc., herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, by disciplining Charles Davis and threatening him with discharge for engaging in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, later enforcing a certain no-electioneering rule against him with instructions to refrain from engaging in such protected activity, and by discharging Walter Price at a still later time because he also engaged in union or other protected concerted activities.

Upon the entire record, my observation of witnesses and consideration of post-hearing briefs, I make the following:

#### FINDINGS OF FACT AND RESULTANT CONCLUSIONS OF LAW

Respondent employs 200 persons at this metropolitan food distribution center where it is party to collective-bargaining agreements with Teamster and Bakery Workers' Locals covering warehouse and baking (machine) operations, respectively.<sup>1</sup> Charles Davis has worked the afternoon shift as a grocery warehouseman out of the replacement pool since October 1978, although for the approximate period November 1979 through January 1980 he was on industrial injury leave. Walter Price worked midnight shift as a bakery helper, but without regular functional assignment, beginning in June 1978 and through a last working day of March 28, 1980. As traditionally so in this occupation his workdays were Sunday, Monday, Tuesday, Thursday, and Friday, meaning he commenced a work shift which ended at or around 7:30 a.m. of the stated calendar days. At times material to this case Louis Ortiz was assistant warehouse shift manager on nights, while Kenneth Phipps was his superior titled production shift manager. The operationally separate baking plant was managed by Tollie Delaney, who worked a standard 5-day week drawing assistance from Jerry Compton as shop foreman on days and at least one counterpart in Don Remington on nights.<sup>2</sup>

Davis testified that in early February he drew up a petition intended to require functionaries of the Teamsters Local to hold overdue elections for shop steward at the warehouse. Davis circulated this petition openly among fellow employees during nonworking time on February 11 and 12, obtaining 52 signatures in the process. He then submitted it to the Local's secretary on February 13, taking the opportunity to also meet for a lengthy

time with that person. Contemporaneously Davis solicited employee addresses in anticipation of electioneering needs, placing a total of 16 such references in his small personal notebook. The petition was phrased as follows, mirroring issues and subjects that Davis recalled having repeatedly voiced around the facility during an earlier period of December 1978 through May 1979:

We the undersigned demand that the management of Teamsters Local No. 952: 1. conduct elections for shop steward at Lucky Stores Inc., Grocery Warehouse, Swing Shift, 2. enforce our contract rights, especially our right not to be subjected to arbitrary production quotas; 3. enforce Lucky Stores Inc. to comply with our contract attendance agreement, 4. make Lucky Stores Inc. obey Federal Law which allows an employee to be counselled by his shop steward prior to any disciplinary action by management, or any inquiry by management into an employee's suspected wrong doings. 5. insist that the shop steward is present at any meeting between management and an employee where disciplinary action could result; and present at any such meeting from the time that the meeting begins.

Davis testified that on February 14 Ortiz inquired whether he was himself running for the office of steward, to which Davis replied that he was not. The following day Davis was called to Phipps' office, and with shop steward Eddie Coleman present told that management was receiving complaints about employees being threatened in regard to their production rates and about the deliberate dumping of unattended grocery pallets. Davis denied any complicity in threatening anyone or in organizing a work slowdown.<sup>3</sup> Davis testified that at some point in the conversation, at which Ortiz appeared for the final one-third portion, Phipps said that Respondent had gotten rid of "instigators and system fighters" before, and that if one person signed a complaint against Davis he would be fired with the action defended even through an arbitration. As Phipps spoke Davis could see him pointing to a paper on his desk, which was said to be destined for Davis' personnel file.

Following this Davis decided to become a candidate for shop steward, after experiencing dismay because officials of the Teamsters Local merely appointed "Red" Holcomb to the function when Coleman suddenly resigned. Davis mounted his challenge in late February, circulating a candidacy letter among employees in the lunchroom during nonworking time. This letter ran four full typewritten pages, containing pointed criticism of Respondent's employee relations policy and its unenlightenment regarding management of a workplace. On February 27 Davis was again summoned into Phipps' office, and with Holcomb present shown a certain work rule 11 (as set forth accurately in par. 6 of the complaint) that forbade electioneering as well as posting campaign literature or the distribution of pamphlets on company premises. In discussion that followed Phipps alluded to man-

<sup>1</sup> Respondent maintains the facility here involved at Buena Park, California, in connection with operation of retail grocery stores, and annually derives gross revenue in excess of \$500,000 while purchasing goods valued in excess of \$50,000 directly from suppliers located outside California. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and otherwise that General Truck Drivers, Office, Food and Warehouse Local 952, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Bakery, Confectionery and Tobacco Workers' International Union, AFL-CIO, Local Union No. 31, are each a labor organization within the meaning of Sec. 2(5).

<sup>2</sup> All dates and named months hereafter are in 1980, unless shown otherwise.

<sup>3</sup> Davis recalled a comparable accusation emanating from management nearly a year earlier, as did Coleman himself.

agement's understanding that four candidates were running, for which he "didn't care" who won adding that Davis had written "untruths" in the course of otherwise violating rule 11. Phipps stated that no formal discipline was contemplated at the time, but that Davis would be reprimanded for a recurrence.

Phipps' version of these events is that on February 5 he merely expressed that "continued" employee complaints had pointed to Davis and that "two or more" written accusations from employees in which Davis was actually identified as obstructing work routines would result in termination from employment.<sup>4</sup> Phipps denied making any implication to Davis that the episode constituted a verbal warning or that a written reprimand would emanate. Phipps is corroborated by both Ortiz and Coleman with respect to setting the condition of Employer action based on future complaints by two (rather than merely one) persons, and neither of these witnesses, predictably so in the case of Ortiz, has any recollection that Phipps uttered the "instigators/system fighters" words or that he referred to a written warning.<sup>5</sup> In fact Phipps did prepare a minute of the meeting, and placed a copy of it in Davis' record. Phipps agreed that on February 27 he conducted the meeting described by Davis, displayed the candidacy letter, and told Davis not to do this anymore because of the rule.

Price testified that about 3 months after being hired he once complained to Delaney about a job bid being ignored, while later in March he complained to Remington about Respondent's application of seniority principle and on this latter occasion was told to keep his nose clean and his mouth shut.<sup>6</sup> Late in March Price learned that his brother was being sought on a felony charge, and this widened to an urgent family matter involving his sister-

<sup>4</sup> Shortly before February 15 order filler Patrick McGowan had named Davis to management as an instrumental person in overt and covert action tending to interfere with his own brisk work rate, or in verbally expressing that McGowan's enthusiasm for achievement did not set well with numerous other employees. McGowan testified that, in an earlier intense discussion with Davis away from the facility, the latter had recommended a "slowdown" so as not to "jack up the average" (number of grocery cases pulled off the warehouse shelves for store delivery). Davis recalled a long discussion with McGowan at a nearby eatery after both had finished work on February 15, which extended into the wee hours of February 16 and in which Davis had merely explained realities and background of Respondent's production quota policy to the newer and younger McGowan. Davis recalled further that the upshot of this discussion was an understanding that both would visit a National Labor Relations Board office in a mutual attempt to resolve any work-related problems, but that McGowan soon simply decided not to go.

<sup>5</sup> On the underlying factual issue McGowan testified that he had experienced tampering with his grocery loads over a 2-week period in early February and was harassed over pulling a 300-case-per-hour average in contrast to management's expectation of less than 200. He also recalled being spoken to by Davis at or around that point in time with a tale of how "F-Troop" (reference to an earlier time when war veterans predominated in the warehouse work force) would only pull its own load and "take care" of those distorting their comfortable average. It was in this context that McGowan had, on his own initiative, originally gone to both Ortiz and Phipps seeking guidance on a prudent course, and mentioned Davis' name as the apparent spokesman for McGowan's phantom adversaries. Davis denied any reference to "F-Troop" or that his concededly "aggressive" nature could have projected in menacing fashion towards McGowan at any time.

<sup>6</sup> Price described how these complaints were consistent with 10 or more occasions on which he spoke to a Bakery Workers business agent about seniority problems under the contract and was merely given soothing, inconclusive answers.

in-law in southern California and his mother in Florida. After at least several days of such immersion during available nonworking time, Price and his sister-in-law abruptly left the area for expeditious travel by car to Ohio. The decision to do so was made late in the evening of Friday, March 28, at a time when Price understood there would be no one, unless perhaps unfluent maintenance personnel, to contact at the plant. After several hours of emergency rest along the highway east of Los Angeles the trip was continued with nonstop driving into New Mexico. At this point they took a motel room and Price fell into deep slumber from which his sister-in-law could not wake him at the desired late evening time on Saturday, March 29, when the regular bakery employees would be arriving to start a new workweek as to which Price would have reported his absence. When Price eventually awoke Sunday morning he immediately telephoned in and reached Remington, who was about to leave work. Price testified that he first apologized for having overslept, told Remington of a family emergency which was calling him away, projected the absence to last about 2 weeks, and heard Remington sympathetically agree to make notation of the matter. Remington's version of this call is that Price telephoned in to report a family emergency and inquire how he could get needful time off. Remington denied that Price estimated the length of time he would be away or that he expressly asked for leave of absence. Remington recalled referring Price to either Compton or Delaney, the former of whom would be expected in about 2 hours later and the latter of whom would be expected in Monday morning as usual. Remington then entered the essence of this exchange in the office log, a step similar to his entry at start of this shift when Price had not appeared for work.

The general consternation stemming from Price's brother's status consumed his time in Eastern States until he returned by air to Southern California during early morning hours of Saturday, April 12. Price testified to telephoning the plant that evening and learning that he was not scheduled for work the following week. He recalled appearing at the facility around 7 a.m. on Monday, April 14, speaking passingly with Compton, and later speaking to Delaney alone. Price testified that Delaney favorably embraced Price's stated eagerness to resume work and suggested a call the coming Thursday to check the following week's schedule.<sup>7</sup> Price made such a call at which time Delaney said the schedule was full even for part-time work, and notwithstanding that an employee named Hunter was on it although having lesser length of service with Respondent. Price testified that he questioned Delaney about why job seniority should not entitle him to work, and that with this Delaney answered it seemed best to simply terminate Price for pressing such a point.

Delaney's version is that on Monday, March 31, he had routinely scanned Remington's two log entries and hereafter had superficially in mind some wonderment

<sup>7</sup> Bakery operations are scheduled on Thursdays for the workweek to begin 3 days later. At this time regular job holders are confirmed for the week and miscellaneous employees such as Price are assigned particular functions throughout that coming week to fulfill overall baking needs.

about where Price was, why he had not heard from him, and what he might say should he reappear. Delaney testified that he had no contact after this with Price until Wednesday, April 16, when the latter appeared at his office inquiring about work. Delaney heard out an explanation of the absence and a stated desire to resume work, but on Price's departure considered him terminated for unjustified absence from work in the nature of abandoning a position and processed personnel forms to this effect on April 18, adding the express entry that Price not be rehired. Delaney denied any discussion of seniority rights at this time, recalling only that Price later telephoned back several times to mention having checked his status with the Bakery Workers Local and that he was willing to forfeit seniority rights if Respondent would rehire him.

A subsidiary issue that associates to resolution of Price's case is the status of Remington within the meaning of Section 2(11) of the Act. Price testified that Remington is the only person of authority in the department on midnights and makes assignments or schedule changes as needed. Price has typically called in to Remington in the past about missing work because of illness, and heard him simply comment "fine" without other repercussion. Additionally, Price has heard Remington threaten employees for not performing their work adequately. Remington testified that although a member of the bargaining unit he organizes the guys working and sees that product gets out right. A leadman for the wrapping section is also present for the shift, making 10 cents per hour less than Remington himself. Remington denied any authority to grant leave of absence to an employee and Delaney affirms this, contrasting Remington's situation to the more authoritative Compton whose day-shift hours of work largely parallel Delaney's own except for Tuesdays off.

I am satisfied that Remington is a statutory supervisor within the meaning of the Act and thus Respondent's agent under Section 2(13). It does not profit Respondent to establish that Remington cannot validly grant leaves of absence when his role in the bakery operation shows independent judgment in directing a structured work force and solving routine dilemma on his own initiative. Inclusion under the collective-bargaining agreement is not controlling and Respondent's perception of fuller authority in Compton does not detract from Remington's critical role in the ongoing mission. This is particularly true where an intermediate subordinate is found between Remington himself and the rank and file.

Beyond this point the case turns largely on credibility. I find both Charging Parties to be unworthy of belief, as their demeanor, coupled with other factors, persuades that each has fabricated critical portions of their testimony. Davis presents a marginal paranoia toward management which translates into maliciousness, while Price's vacillating and conflicting explanations of his odyssey shows him as having little regard for the truth. More specifically in Davis' case, he is effectively contradicted on salient points by the highly credible and impressive McGowan, while both Phipps and Coleman credibly deny any telling utterances as he claimed them to have

been made on February 15.<sup>8</sup> In regard to Price I note the documentation advanced by the General Counsel that would harmonize with his testimony, but believe that the highly credible versions of Remington and Delaney represent the actual facts.

On this basis it results that Davis experienced no more than a well-deserved cautioning on February 15 about interfering with legitimate routine, and the episode, including its buildup, was devoid of any relationship to statutorily protected activity.<sup>9</sup>

The second branch of Davis' case deals with Respondent having forbidden his electioneering at the workplace. Here the rule is fundamentally overbroad, and Respondent's contention that Davis' candidacy letter was potentially disruptive of employee discipline is without factual support. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). Nor is there any indication that considerations of littering or other special circumstance was present as to upset the presumptive invalidity of a no-distribution rule which is not limited to working areas. *Clougherty Packing Company*, 240 NLRB 932 (1979). The confined nature of Davis' distribution foreclosed Respondent from the prohibition imposed by Phipps on February 27, and gave rise to a violation of the Act for this reason as well as intrinsic nature of the rule.

The uncontradicted characterization of background concerning Price is that he was taunted by Remington to remain hygienically apart from criticizing management's application of seniority, and that Delaney capped his attempt to rejoin the baking schedule with a ruthless severance from employment. The former point is insufficiently material to the case because Remington had no role in the discharge which Delaney fashioned, while the second point fails of true factual support in light of thorough discrediting of Price. Besides the inherent falsity of what Price has contrived to say, overall circumstances show nothing more than reckless abandonment of a position. Price was ostensibly less than alert when he made the long-distance call of March 30 to Remington while the latter, though anxious to leave, would have been fully competent to pick up essentials of any request. I am convinced that Price has hopelessly garbled facts surrounding his abrupt departure and extensive absence and now seeks to distort the truth in a final effort at vindication. I therefore find that in speaking with Remington he did not in any recognizable way request leave of absence nor did he state the length of time he would be gone.<sup>10</sup>

<sup>8</sup> Ortiz adds to this contradiction, but was himself not present throughout the entire meeting. I note some shakiness in Coleman's testimony, particularly in regard to not recalling the extent of Ortiz' participation, but overall his recollection seems both genuine and adequate to add weight to a finding that Phipps did not characterize Davis as an instigating nuisance or condition his job on merely one single future complaint.

<sup>9</sup> The collective-bargaining agreement deals with the root of Davis' resentments in language no more specific than reference to "systems of production requirement" as the Company may deem reasonable (art. V). It is also academic whether the minute prepared by Phipps was or was not a "written reprimand," although I am satisfied that upon reflection and comprehension by Personnel Manager Richard Stalcup, Jr., and as he so testified, it is not of that character.

<sup>10</sup> It is notable that his subsequent Ohio-Florida travels were based on funding and accommodations not known to him at the time of the Remington call.

Further, I find that Remington plainly stated that either Compton or Delaney was to be spoken with promptly in order to reach any definitive understanding about a job being held over to Price. As to happenings in April there are many reasons why some person in the Price household could have telephoned that number which rings at Respondent's bakery department; however, here the key questions deal with circumstances of the Delaney contact which Price does not even claim occurred until April 14. As to this I accept Delaney's testimony that he routinely heard out an errant employee as done numerous times before and found no unusual equities in the situation.<sup>11</sup>

Accordingly, I render the conclusions of law that Respondent, by maintaining and enforcing an overly broad no-distribution rule, has violated Sections 8(a)(1) and 2(6) and (7) of the Act, but that it has not violated the Act in any respect other than as specifically found.

#### Disposition

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>12</sup>

The Respondent, Lucky Stores, Inc., Buena Park, California, its officers, agents, successors, and assigns, shall:

<sup>11</sup> I expressly discredit a final phase of Price's testimony in which he recalled that Delaney once couched his refusal to rehire Price as being based on the Bakery Workers Union having been contacted. The pertinent collective-bargaining agreement contains the following language, insofar as relevant to the Price case:

In case of sickness or emergency, the Employer shall be notified as soon as possible. [art. III, G.]

<sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the

#### 1. Cease and desist from:

(a) Maintaining or enforcing any rule prohibiting distribution of union election campaign literature on company premises.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

#### 2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Rescind or modify the rule prohibiting electioneering on company property or distribution of pamphlets on company premises other than working areas.

(b) Post at its Buena Park, California, facility copies of the attached notice marked "Appendix."<sup>13</sup> Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated amended complaint be dismissed in all other respects.

findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.

<sup>13</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."